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18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

20 MICHAEL LAVIGNE, *et al.*,
21 Plaintiffs,
22 vs.
23 HERBALIFE LTD., *et al.*,
24 Defendants.

CASE NO. 2:18-cv-07480-JAK (MRWx)
[Related Case 2:13-cv-02488-BRO-RZ]

AMENDED DECLARATION OF
YANIV ADAR IN SUPPORT OF
PLAINTIFFS' DAUBERT MOTION
TO AND MOTION *IN LIMINE* TO
EXCLUDE EXPERT OPINION OF
JONATHAN T. TOMLIN

Assigned to Hon. John A. Kronstadt,
Courtroom 10B

1 I, Yaniv Adar, declare:

2 1. I am an attorney admitted *Pro Hac Vice* in the State of California and the
3 United States District Court, Central District of California. I am an attorney at Mark
4 Migdal and Hayden (“MMH”) and counsel of record for Plaintiffs Patricia Rodgers,
5 Izaar Valdez and Jennifer Ribalta (“Plaintiffs”) in the above-captioned matter. My
6 knowledge of the information and events described herein derives from my personal
7 knowledge, a careful review of the file, relevant court records and communications
8 with other Plaintiffs’ counsel, and if called as a witness, I could and would completely
9 testify thereto.

10 2. Attached as **Exhibit A** is a true and correct copy of the January 11, 2021
11 Expert Report of Jonathan T. Tomlin (“Tomlin Report”).

12 I declare under penalty of perjury under the laws of the United States of
13 America that the foregoing is true and correct. Executed on March 22, 2021, at Miami,
14 Florida.

15
16 /s/ Yaniv Adar
17 Yaniv Adar
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EXHIBIT A

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
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11 MICHAEL LAVIGNE, *et al.*,

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13 vs.

14 HERBALIFE LTD., *et al.*,

15 Defendants.
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CASE NO. 2:18-cv-07480-JAK (MRW_x)

[Related Case 2:13-cv-02488-BRO-RZ]

**EXPERT REPORT OF
JONATHAN T. TOMLIN**

January 11, 2021

Assigned to Hon. John A. Kronstadt,
Courtroom 10B

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1 **I. INTRODUCTION**

2 **A. Qualifications**

3 1. I am an economist and Senior Managing Director in the Los
4 Angeles office of Ankura Consulting. Ankura Consulting is an international
5 consulting services firm with over thirty offices worldwide.

6 2. I hold a B.A. in economics from the University of Pennsylvania,
7 an M.A. in economics from the University of California, Los Angeles, and a Ph.D.
8 in economics from UCLA. My specialization for over twenty-five years as
9 a business economist has been in the application of economics to legal issues.
10 I have assessed economic damages in numerous cases involving the appropriateness
11 of class certification. I have also specifically assessed economic damages issues in
12 multiple consumer class actions.

13 3. I have published over twenty articles on law and economics. My
14 research has been published in books, peer-reviewed economic journals, and law
15 reviews. Many of my publications focus on the appropriate calculation of economic
16 damages. Several focus on the topic of damages and restitution involving consumer
17 class actions. My research has been accepted in such publications as the *Review of*
18 *Law and Economics*, the *Journal of Forensic Economics*, the *B.E. Journal of*
19 *Economic Analysis and Policy*, and the *George Mason Law Review*. I have served
20 as an economic commentator for the online edition of *Forbes* and for *theStreet.com*.

21 4. My past and present professional affiliations include the
22 American Economic Association, the American Finance Association, the American
23 Law and Economics Association, and the National Association of Business
24 Economists. I have served as an Economics Instructor for the National Association
25 of Certified Valuation Analysts, where I taught principles of economic damages
26 analysis. In addition, I have testified as an economic expert witness for cases in
27 state and federal courts.

28 5. My curriculum vitae is attached as Exhibit 1. Ankura Consulting

1 is being compensated for my work on this matter at my standard hourly rate of \$625.

2 **B. Task Presented and Summary of Conclusions Reached**

3 6. I have been retained on behalf of Herbalife International of
4 America, Inc. (“Herbalife”) to evaluate, from the perspective of an economist, the
5 damages model proposed by the Plaintiffs in this case, which Plaintiffs describe as
6 seeking recovery of the money they spent purchasing tickets to, and attending,
7 events.”¹ In particular, I have been asked to determine whether such a calculation of
8 damages is capable of accurately measuring restitution and compensatory damages
9 on a classwide basis in this case.²

10 7. As a result of my analysis in this case, I have the following
11 opinions:

12 (a) With regard to restitution damages, Plaintiffs’ proposed
13 calculation would provide a “full refund” to putative class members.³ I am
14 informed that, in order to establish that a “full refund” is applicable in this case, the
15 Plaintiffs must demonstrate that they did not receive any value for the tickets they
16 purchased. Plaintiffs have not provided any economic support for the conclusion
17 that class members did not receive any value from their event ticket purchases.⁴ In
18

19 ¹ Plaintiffs’ Reply in Support of Plaintiffs’ Motion for Class Certification filed
20 January 13, 2020 (“Reply in Support of Class Certification”) at page 8.

21 ² I offer no opinion on liability issues in this matter. For purposes of my
22 assessment of the Plaintiffs’ proposed damages calculation I have been asked to
assume liability.

23 ³ I refer to the term “damages” in an economic sense. I understand that, under
24 applicable UCL law, Plaintiffs are entitled to restitution but not “damages.”

25 ⁴ I am referring to the information provided by the Plaintiffs in their Amended
26 Complaint filed November 12, 2019 (“Amended Complaint”), Plaintiffs’ Notice of
27 Motion and Motion for Class Certification filed November 25, 2019 (“Motion for
28 Class Certification”) and Reply in Support of Class Certification. If the Plaintiffs
provide further information about their proposed damages method, I understand that

1 addition to the content of the events themselves, some (and perhaps many, most, or
2 all) events provided valuable products and/or services to attendees including
3 products, meals, and entertainment.

4 (b) With regard to compensatory damages, Plaintiffs’
5 proposed method assumes that, absent the allegedly wrongful conduct in this case,
6 no putative class members would have chosen to attend an event.⁵ It also assumes
7 that the events and the travel expenses incurred by all putative class members and
8 for all events have no value. The Plaintiffs provide no support for these strong
9 assumptions. It is highly likely that these assumptions are inaccurate for some (and
10 perhaps many, most, or all) putative class members.

11 (c) Determining the value any putative class member received
12 for an event ticket they purchased would require individualized analysis. As
13 a matter of economics, it cannot merely be presumed that none of the events had any
14 value.

15 (d) Determining the costs incurred by putative class members
16 for travel to and from events and the value, if any, such putative class members
17 obtained from such travel outside of event attendance also is inherently
18 individualized.

19 8. In short, the Plaintiffs have not provided any reasonable
20 economic support for a classwide calculation of either restitution or compensatory
21 damages based on “the money they spent purchasing tickets to, and attending,
22 events.”⁶

23
24 I may be asked to evaluate that information.

25 ⁵ As explained below, I also refer to the compensatory damages sought by the
26 Plaintiffs in this case as “reliance” damages.

27 ⁶ Plaintiffs’ Reply in Support of Class Certification at page 8. I also refer to
28 compensatory damages as “reliance damage” below.

1 9. The list of materials I reviewed in performing my analysis is
2 attached as Exhibit 2. The basis for my opinions is summarized below. I may
3 update and/or revise this analysis should further information be provided to me.
4 I understand that I may be asked to perform an economic evaluation of any expert
5 analysis that Plaintiffs may provide related to their proposed damages calculation.

6 **II. BACKGROUND**

7 **A. Herbalife**

8 10. Herbalife is a publicly traded company that “provides nutrition
9 solutions for consumers looking to achieve results in the areas of weight
10 management, health and wellness, and sports performance.”⁷ Herbalife sells its
11 product through a “direct selling business model” which relies in part on a network
12 of “distributors.”⁸ In support of this business, Herbalife and some of its distributors
13 organize and conduct “events” that “provide updates on product education, sales and
14 marketing training, and instruction on available tools.”⁹ While some of these events
15 are organized and financed at the corporate level by Herbalife, others are organized
16 and financed by distributors.¹⁰

17
18
19 ⁷ Herbalife 2019 Annual Report at page 5. In addition to distributors, Herbalife
20 has “preferred members” who purchase Herbalife product at discounted prices as
21 customers for their own use but do not pursue the business opportunity of selling
22 products. Herbalife 2019 Annual Report at page 7; Deposition of Robert Bogard
(Herbalife Senior Director of North American Sales & Strategy) Volume 1 dated
September 25, 2019 (“Bogard Deposition”) at pages 32-33.

23 ⁸ Herbalife 2019 Annual Report at page 7.

24 ⁹ Herbalife 2019 Annual Report at page 8.

25
26 ¹⁰ Declaration of Bob Bogard (Herbalife Senior Director of North American Sales
27 & Strategy) filed December 20, 2019 (“Bogard Declaration”) at paragraphs 3 and
28 13.

1 **B. Plaintiff Allegations**

2 11. The Plaintiffs in this case are three former distributors.¹¹ The
3 Plaintiffs describe Herbalife events as “Circle of Success events” and allege, *inter*
4 *alia*, that “events are pitched as the guaranteed pathway to attaining life changing
5 financial success” but that “there is no correlation between financial success and
6 event attendance” and that “if Herbalife told the truth . . . no reasonable person,
7 including Plaintiffs, would have attended Circle of Success events, paid for tickets
8 to Circle of Success events, and paid for incidental expenses (such as hotel and
9 airfare) to attend Circle of Success events.”¹² The Plaintiffs state that they “seek
10 damages and injunctive relief against the corrupt organization of individuals and
11 entities who sell, operate, and compel participation in the Circle of Success.”¹³

12 12. The Plaintiffs seek to “certify a class defined as: All persons who
13 purchased tickets to and attended at least two Circle of Success events from 2009
14 until the present, in pursuit of Herbalife’s business opportunity.”¹⁴ They state that
15 the “damages model proposed here is simple: Plaintiffs are seeking recovery of the
16 money they spent purchasing tickets to, and attending, events.”¹⁵ I am informed that
17 the Plaintiffs have not provided any expert or other analysis to date supporting the
18 validity of this proposed damages model. I understand that Plaintiffs may submit
19 such a report contemporaneously with the service of my report.
20
21

22 ¹¹ Amended Complaint at paragraphs 16-19. I understand that Jeff Rodgers,
23 a fourth Plaintiff listed in the Amended Complaint, is now deceased.

24 ¹² Amended Complaint at paragraphs 4 and 9.

25 ¹³ Amended Complaint at paragraph 11.

26 ¹⁴ Motion for Class Certification at page 2.

27 ¹⁵ Plaintiffs’ Reply in Support of Class Certification at page 8.
28

1 **C. Herbalife Events**

2 13. Both corporate events and distributor-run events are available to
3 distributors. Corporate events are financed by Herbalife and often organized by
4 Herbalife. Distributor-run events are planned and organized by local distributors.¹⁶

5 14. There are multiple types of corporate events that occur over the
6 year. The content of these events varies across events and has varied over time.¹⁷
7 According to Bob Bogard, Senior Director of North American Sales & Strategy at
8 Herbalife, Herbalife has sponsored over 500 corporate events since January 2009.¹⁸

9 (a) *Kickoff events* occur at the beginning of the calendar
10 year.¹⁹ They take place over one or two days and “focus on planning and
11 promotions for the upcoming year.”²⁰ Herbalife pays for some of the costs of
12 Kickoff events and distributors who organize them collect the revenues.²¹

13 (b) *Leadership Development Weekends (“LDWs”)* focus on
14 “business opportunity training” and occur in the spring and the fall.²² These are
15 organized by Herbalife and multiple such events occur at different locations (“50 to
16 60” per year).²³

17 _____
18 ¹⁶ Declaration of Tommy Gioiosa (Independent Herbalife Distributor who helped
19 plan and organize Success Training Seminars) filed December 20, 2019 (“Gioiosa
Declaration”) at paragraph 3.

20 ¹⁷ Bogard Declaration at paragraphs 7 and 11.

21 ¹⁸ Bogard Declaration at paragraph 3.

22 ¹⁹ Bogard Deposition at page 98.

23 ²⁰ Bogard Declaration at paragraph 7.

24 ²¹ Bogard Declaration at paragraph 7.

25 ²² Bogard Declaration at paragraphs 3 and 9; Bogard Deposition at page 101.

26 ²³ Bogard Declaration at paragraph 3.

1 (c) *A Future President's Retreat* occurs once a year and
2 provides "advanced training" for those who have obtained certain royalty
3 thresholds.²⁴

4 (d) *An Extravaganza* occurs once a year and typically
5 includes speeches by Herbalife employees and distributors.²⁵

6 15. There are also numerous events that are organized and financed
7 by distributors.²⁶

8 (a) *Success Training Seminars ("STSs")* are locally organized
9 and "in any given month, there can be anywhere from 150 to 175 STS events in
10 different cities around the United States, each of which is organized by a different
11 distributor."²⁷ These provide "training and advice" and often feature speakers and
12 presentations.²⁸

13 (b) *Herbalife Opportunity Meetings ("HOMs")* focus on
14 providing information about the Herbalife business opportunity and are locally
15 organized and run by distributors.²⁹

16
17
18
19 ²⁴ Bogard Declaration at paragraph 10; Bogard Deposition at page 104.

20 ²⁵ Bogard Declaration at paragraph 8; Bogard Deposition at page 103.

21 ²⁶ Bogard Declaration at paragraph 13.

22 ²⁷ Bogard Declaration at paragraph 17.

23 ²⁸ Gioiosa Declaration at paragraph 5.

24 ²⁹ Deposition of Ibelis Montesino (Herbalife Senior Vice President and Managing
25 Director of North America who manages sales and marketing) dated September 27,
26 2019 ("Montesino Deposition") at page 132; Bogard Deposition at page 105.
27 Bogard Declaration at paragraph 13. Some Herbalife corporate events include
28 a "HOM." Bogard Deposition at pages 109-110.

1 **III. ECONOMIC EVALUATION OF PLAINTIFFS' PROPOSED**
2 **DAMAGES METHOD**

3 **A. Economic Fundamentals of Damages Calculations**

4 16. A proper calculation of economic damages requires a description
5 of what economists call a "but-for" scenario.³⁰ The but-for world implies a set of
6 economic values—such as quantities or prices—that would have prevailed “but-for”
7 the alleged wrongful conduct at issue. These but-for values become the basis for
8 calculating damages. In other words, the but-for world describes the economic
9 environment that would have prevailed in the absence of the alleged wrongful
10 conduct. Any excess of these “but-for” values above the actual value obtained by
11 a Plaintiff represents damages.

12 17. A proper economic damages analysis begins with the allegations
13 made by the Plaintiff(s) and an understanding of the proper legal measure of
14 damages. In this case, the Plaintiffs raise two separate claims of economic losses
15 (“damages”): (i) Restitution for their claim under California Unfair Competition
16 Law (“UCL”),³¹ and (ii) Compensatory damages under their claims of Racketeering
17 and Negligent Misrepresentation.³² Below I consider both of the Plaintiffs’ claims
18 of economic losses (restitution and compensatory damages), the “but-for” scenario
19 under these claims, and the requirements of a damages model that can determine
20 whether class members were harmed and, if so, the amount of such economic harm

21 _____
22 ³⁰ Economists typically evaluate the financial position of a Plaintiff “but-for” the
23 allegedly wrongful act or acts of a Defendant in order to calculate damages. *See,*
24 *e.g., Mark Allen, Robert Hall, and Victoria Lazear, “Reference Guide on Estimation*
of Economic Damages,” Reference Manual on Scientific Evidence, Federal Judicial
Center, Third Edition, 2011 (“Hall, et al., 2011”) at page 432.

25 ³¹ Amended Complaint at paragraph 239.

26 ³² Amended Complaint at paragraphs 225, 229, and 243. Plaintiffs seek a damages
27 award equal to treble the alleged compensatory damages amount.
28

1 on a classwide basis. In order to avoid confusion, I will refer to “Restitution
2 Damages” for the UCL claim and “Reliance Damages” for the Racketeering and
3 Negligent Misrepresentation claims.³³

4 **B. Restitution Damages**

5 18. I am informed that the proper legal measure of restitution in this
6 case is a “price premium,” which is “the difference between the market price
7 actually paid by consumers and the true market price that reflects the impact of the
8 [alleged] unlawful, unfair, or fraudulent business practices.”³⁴ The “true market”
9 price represents the “but-for” economic value described above.

10 19. In this case, the Plaintiffs seek “recovery of the money they spent
11 purchasing tickets to, and attending, events.”³⁵ Thus, with regard to event ticket
12 prices, Plaintiffs seek the actual full price of their tickets for restitution with no
13 deduction for the “true market price that reflects the impact of the [alleged]
14 unlawful, unfair, or fraudulent business practices.” This proposed method amounts
15 to a “full refund” of all event ticket purchases to all putative class members under
16 the extreme assumption that these purchases generated no value for any event.³⁶

17
18 _____
19 ³³ I use the term “Restitution Damages” in the economic sense and understand that,
20 under the law, Plaintiffs are not entitled to “damages” under a UCL claim. In
assessing restitution below, I use the definition provided to me by counsel.

21 ³⁴ *Werdebaugh v. Blue Diamond Growers*, No. 12-2724, 2014 WL 2191901 at *22
22 (N.D. Cal. May 23, 2014) at page 16; *Wendy Chowning v. Kohl’s Department*
23 *Stores, Inc., et al.*, United States Court of Appeals for the Ninth Circuit,
24 Memorandum filed June 18, 2018; “Reliability of ‘Price Premium’ Calculations in
Class Actions,” Jon Tomlin, *Law360*, October 10, 2017 (“Tomlin 2017”).

25 ³⁵ Plaintiffs’ Reply in Support of Class Certification at page 8.

26 ³⁶ *See, e.g., Wendy Chowning v. Kohl’s Department Stores, Inc., et al.*, United
27 States Court of Appeals for the Ninth Circuit, Memorandum filed June 18, 2018 at
28 paragraph 3.

1 Moreover, the costs that putative class members paid to attend events, aside from
2 event tickets (such as travel expenses and hotel rooms), were not incurred in
3 exchange for products or services sold by Herbalife and, therefore, I am informed
4 are not recoverable by the Plaintiffs as restitution.³⁷ Similarly, I am advised that,
5 because the distributors who sponsored the relevant events are not defendants in this
6 case, ticket revenues that they received from these distributor-run events may not be
7 recovered from Herbalife in this case.

8 20. Plaintiffs' proposed full refund calculation can only be an
9 appropriate calculation of restitution if none of the events for which the Plaintiffs
10 seek restitution had any economic value for any putative class member. If, instead,
11 the event ticket purchased by a putative class member had a value at least equal to
12 the ticket price they paid, then this putative class member sustained no economic
13 harm (and no restitution loss). If the event ticket purchased by a putative class
14 member had any economic value (even if less than the price paid by that putative
15 class member) then Plaintiffs' "full refund" method would overcompensate that
16 class member and not properly measure restitution.

17 21. The Plaintiffs have not provided any economic support for the
18 assumption that no putative class member received any economic value for any of
19 the events they attended. Even assuming that Plaintiffs' allegations are true, it is
20 highly likely that some of the events at issue had economic value (and it may be the
21 case that many or most had economic value).

22 22. The Plaintiffs have not clearly articulated the "but-for" scenario
23 for their proposed damages method. For example, is it that Herbalife and/or its
24 distributors should have provided particular information regarding its events to
25 attendees before the events (and, if so, what information)? Is it instead, that
26 Herbalife and/or its distributors should never have made particular statements at the

27 _____
28 ³⁷ I have no legal opinions on this or any other legal issue in this case.

1 events and/or presented particular materials at the events (and, if so, what statements
2 and events)? Different assumptions regarding the “but-for” scenario can lead to
3 different determinations as to whether a putative class member sustained any
4 economic injury and, if so, the amount. Moreover, different determinations of what,
5 if any, conduct was wrongful by the finder of fact could lead to different
6 determinations of whether particular class members were injured and, if so, the
7 amount.

8 23. Plaintiffs allege, *inter alia*, that “Herbalife has a duty to disclose
9 that increased event attendance does not lead to increased success at Herbalife,
10 and/or that Herbalife is unaware of any correlation between a distributor’s event
11 attendance and financial success.”³⁸ For purposes of assessing Plaintiffs’ proposed
12 damages calculation, I will assume that the Plaintiffs are alleging a “but-for”
13 scenario in which Herbalife should have made some disclosure to event participants
14 either that: (a) “event attendance does not lead to increased success at Herbalife,” or
15 (b) “Herbalife is unaware of any correlation between a distributor’s event attendance
16 and financial success.”

17 24. Assessing whether or not an individual putative class member
18 sustained economic injury in this case (and the amount of any restitution), requires
19 determining the prices that would have prevailed for each Herbalife event in the
20 counterfactual “but-for” scenario in which Herbalife disclosed to event participants
21 either that event attendance “does not lead to financial success” or that Herbalife is
22 “unaware” of any correlation between event attendance and financial success. It
23 cannot be presumed that the price of all events in this scenario would be zero (*i.e.*,
24 that they had no value—the basis of the Plaintiffs’ proposed calculation).

25 25. Market prices are determined by demand, costs, and competitive
26

27 ³⁸ Amended Complaint at paragraph 222.
28

1 conditions, as well as by pricing strategies.³⁹ In this case, determining the price of
2 an event that would have existed in the “but-for” scenario requires examining each
3 of these factors for each event at issue. With regard to demand, the impact on the
4 prices of events, if any, of a disclosure by Herbalife regarding event attendance and
5 financial success would depend upon how this impacted what economists call the
6 “willingness to pay” of potential event attendees for each event. With regard to
7 costs, it would require examining Herbalife and distributor costs for each event.
8 Finally, with regard to competitive conditions/pricing strategy, it would require
9 examining how Herbalife’s pricing strategy (and that of distributors) would have
10 been impacted, if at all, by such disclosures for each event. Herbalife did not price
11 its events based on profit maximization for these events. Rather, it subsidized the
12 costs of its corporate events (*i.e.*, priced them below costs) and incurred costs for
13 distributor events but let distributors keep the revenues.⁴⁰

14 26. Thus, determining whether or not an event has no economic
15 value in this case is a complex economic question. It cannot simply be assumed.
16 Plaintiffs’ full refund restitution damages calculation presumes that the “but-for”
17 price of all events (thousands of them) would have been zero but provides no basis
18 for such an assumption. Not only is such an assumption unsupported by the
19 required economic analysis in the Plaintiffs’ Amended Complaint, Motion for Class
20 Certification, and Reply in Support of Class Certification, it is highly unlikely to be
21 true. In other words, it is highly likely that some (and perhaps many, most, or even
22 all) events would have had a positive economic value even if Herbalife had made
23 a disclosure regarding financial success.

24 _____
25 ³⁹ Tomlin 2017. *See also*, “Valuation of Patented Product Features,” Greg Allenby,
26 Jeff Brazell, John Howell, and Peter Rossi, *Journal of Law and Economics*, vol. 57,
August 2014, at page 630.

27 ⁴⁰ Bogard Deposition at page 120, 131; Bogard Declaration at paragraph 7
28

1 27. On the demand side, there are several reasons why individual
2 attendees could have been willing to pay for a ticket to a specific event following
3 a disclosure by Herbalife that there was either no correlation between event
4 attendance and financial success at Herbalife or that Herbalife did not know whether
5 or not there was such a correlation:⁴¹

6 (i) Events often provided goods with positive economic
7 value—such as meals, entertainment, and Herbalife products.⁴²

8 (ii) Some of the events included what economists call “non-
9 firm-specific” training, meaning training that may have value outside of Herbalife
10 such as training on regulations and money management.⁴³

11 (iii) There was a social and networking aspect of the events
12 (including parties) which some event participants found fun.⁴⁴

13 (iv) If the disclosure by Herbalife was that it was unaware of
14 any correlation between attendance and financial success, it still may have been
15 economically rational for some attendees to be willing to pay for an event ticket
16 based on the possibility of it leading to increased financial success at Herbalife
17 (even if that success was uncertain).

18 28. At least one of the named Plaintiffs in this case, Patricia
19

20 _____
21 ⁴¹ In economic terminology they could have had a positive “willingness to pay.”

22 ⁴² Montesino Deposition at pages 41 and 159; Bogard Declaration at paragraph 6.

23 ⁴³ Bogard Deposition at pages 127-128; Montesino Deposition at pages, 47, 139-
24 140; Deposition of Thomas Gioiosa (Independent Herbalife Distributor who helped
25 plan and organize Success Training Seminars) dated October 10, 2019 at pages 107-
26 110, 248; Deposition of Patricia Rodgers dated September 21, 2019 (“Rodgers
Deposition”) at pages 79-80; Bogard Declaration at paragraph 6.

27 ⁴⁴ Rodgers Deposition at pages 79-80; Deposition of Jennifer Ribalta dated
28 August 29, 2019, at page 59.

1 Rodgers, testified that she found value in attending events for several years.⁴⁵ In
2 addition, many putative class members continued to attend numerous events (and,
3 therefore, pay for tickets) over an extended time period (presumably after they had
4 an opportunity to view the event content and see if it had any impact on their own
5 business). In addition, Herbalife charged similar prices for events after the initial
6 Complaint in this case (it did not reduce prices to zero). Thus, attendees continued
7 to choose to pay similar prices for events even after Plaintiffs' allegations that there
8 was no correlation between financial success and events was public information.⁴⁶
9 These are also factors supporting the conclusion that some (and perhaps, many,
10 most, or all) events had a positive economic value.

11 29. In addition to the demand side, Herbalife incurred costs for its
12 events and in supporting some distributor-led events as well.⁴⁷ Distributors
13 presumably also incurred costs in holding events.⁴⁸ Other things equal, these costs
14 would also tend to lead to positive prices for some events in the "but-for" scenario.

15 30. Finally, the large number of different types of events, in different
16 locations, and in different time periods makes it unlikely that none of the events at
17 issue had any value. According to Bob Bogard, Senior Director of North American
18 Sales & Strategy at Herbalife, there have been approximately 540 corporate events
19

20 ⁴⁵ Rodgers Deposition at pages 81-82.

21 ⁴⁶ Herbalife's Responses to Plaintiff Jennifer Ribalta's Second Set of
22 Interrogatories dated September 13, 2019, Exhibit 1 (showing ticket prices).
23 Plaintiffs' allegations involving Herbalife and distributor events has been publicly
24 available information since at least August of 2018. *See*, Curt Anderson, "Herbalife
25 Distributors Claim in \$1B Suit Events Were a Sham," *Associated Press*, August 21,
2018. Data on Herbalife events shows numerous attendees who attended events
both before and after this date. *See* HLF_034754.

26 ⁴⁷ Bogard Deposition at page 120, 131; Bogard Declaration at paragraphs 6 and 7.

27 ⁴⁸ Montesino Deposition at page 151.
28

1 and 2,200 distributor-run events since January 2009 (the beginning of the proposed
2 class period).⁴⁹ In order for Plaintiffs' full refund calculation to be a proper measure
3 of restitution it would have to be the case that none of these events would have had
4 any economic value in the "but-for" scenario.

5 31. Determining restitution in this case would involve an
6 individualized analysis based on specific events. In other words, an individualized
7 analysis would be required to determine whether or not a full refund was an
8 appropriate measure of damages; whether a partial refund was more appropriate; or
9 whether an individual putative class member received a value for the events they
10 attended equal to or greater than their ticket price (and, therefore, suffered no
11 economic injury under a restitution measure). This conclusion holds even if one
12 accepts Plaintiffs' argument that Herbalife's messaging regarding the correlation
13 between event success and financial success was consistent across different events.⁵⁰
14 This is because, even if the messaging by Herbalife was the same or similar across
15 events, the events themselves differed in terms of location, when they were held,
16 their duration, what speakers were at the event, the topics at the event, their price,
17 whether they were corporate events or distributor-led events, who was allowed to
18 attend, whether Herbalife products were provided, whether entertainment was
19 provided, and whether a meal or meals were provided (and what those meals
20 were).⁵¹ In terms of economics, this means that the demand and costs likely differed

21 _____
22 ⁴⁹ Bogard Declaration at paragraphs 3 and 17.

23 ⁵⁰ Amended Complaint at paragraph 199.

24 ⁵¹ Herbalife's Responses to Plaintiff Jennifer Ribalta's Second Set of
25 Interrogatories dated September 13, 2019, Exhibit 1 (ticket prices); Bogard
26 Declaration at paragraphs 4-11, 13, and 17-19; Gioiosa Declaration at paragraph 5;
27 Declaration of Jorge de la Concepcion (Independent Herbalife Distributor who
28 helped plan and organize Success Training Seminars) filed December 20, 2019, at
paragraph 5; Montesino Deposition at p. 148.

1 between events and the expected price, therefore, differed as well.

2 **C. Reliance Damages**

3 32. In addition to seeking restitution under their Unfair Competition
4 Law claim, Plaintiffs' seek compensatory damages under their counts for
5 Racketeering and Negligent Misrepresentation.⁵² Once again, the Plaintiffs' have
6 not clearly articulated what they perceive to be the counterfactual "but-for" scenario
7 underlying their proposed damages calculation based on a full ticket refund and, in
8 the case of compensatory damages, other expenses related to attending events.
9 However, they have stated that "Plaintiffs relied on the representations made by
10 Herbalife at Circle of Success events and were harmed when they expended
11 substantial money, time, and effort attending those events."⁵³ Thus, for purposes of
12 assessing the Plaintiffs' proposed compensatory damages calculation, I assume that
13 they are proposing a "but-for" scenario in which Herbalife either did not make
14 specific claims related to events or provided additional information on these events
15 related to the relationship between events and financial success.⁵⁴ In this but-for
16 scenario, the Plaintiffs' presumably are assuming that putative class members would
17 not have attended any events.

18 33. The compensatory damages scenario I presume the Plaintiffs are
19 proposing is sometimes labeled "Reliance" damages. Reliance damages can be
20 defined as being based on a scenario in which the plaintiff is "restored to the same
21 position as if the relationship with the defendants' misrepresentation (and resulting
22 harm) had not existed in the first place."⁵⁵ Plaintiffs' proposed damages theory

23 _____
24 ⁵² Amended Complaint at paragraphs 225, 229, and 243.

25 ⁵³ Amended Complaint at paragraph 243.

26 ⁵⁴ If the Plaintiffs' later specify a damages framework and that framework differs
27 from my assumption, I understand that I may be asked to evaluate that framework.

28 ⁵⁵ Hall, *et al.*, 2011 at page 433.

1 would be appropriate for an individual class member under this measure only if in
2 the absence of Herbalife's alleged misrepresentations about events they would not
3 have attended that event *and* they did not obtain any economic benefit from
4 attending that event. If a putative class member would have purchased a ticket and
5 attended an event "but-for" the alleged wrongful conduct in this case (and incurred
6 the same attendance expenses), then the alleged wrongful conduct did not cause
7 them economic injury under this reliance measure. If a putative class member
8 received any economic value from event attendance, then Plaintiffs' proposed
9 calculation overstates damages by not offsetting ticket expenditures and travel
10 expenses by this economic value.

11 34. The Plaintiffs' have not provided any economic support to date
12 for the assumption that none of the putative class members would have attended
13 events in the absence of Herbalife's allegedly wrongful conduct in this case. They
14 also have not provided any support for the proposition that no putative class
15 members received any economic value from their attendance. It is highly likely that
16 both of these assumptions are inaccurate. As explained above, there are multiple
17 factors that could have led to a positive "willingness to pay" for some class
18 members regardless of any allegedly wrongful conduct. These include receiving
19 products, meals, non-firm specific training, and social opportunities. Moreover,
20 there were thousands of different events within the proposed class period and, for
21 the Plaintiffs' reliance damages model to be valid, it would have to be the case that
22 none of these events would have led to attendance and none provided any economic
23 value to the individuals who attended them.

24 35. Like a restitution measure of economic harm, determining
25 whether an individual sustained any economic harm under a compensatory damages
26 standard and the extent of that harm also would require an individualized analysis
27 under the Plaintiffs' theory. Determining whether or not an individual likely would
28 have attended a particular event would depend on the particulars of that event.

1 Determining whether an individual received any economic value from attending an
2 event (which might be conferred through, *e.g.*, products or meals that were
3 received), and how much value he or she received, also would require an
4 individualized inquiry into specific events. Finally, determining whether the travel
5 expenses incurred by an individual putative class member conferred any economic
6 value would require individually examining the expenditures of that individual and
7 determining whether the individual received any economic value apart from
8 attending an event (*e.g.*, as part of a vacation or visiting friends or family).

9 **IV. CONCLUSION**

10 36. Based on my analysis of this case, I have the following opinions:

11 (a) With regard to restitution damages, Plaintiffs' proposed
12 damages calculation would provide a "full refund" to putative class members.⁵⁶
13 I am informed that, in order to establish that a "full refund" is applicable in this case,
14 the Plaintiffs must demonstrate that they did not receive any value for the tickets
15 they purchased. Plaintiffs have not provided any economic support for the
16 conclusion that class members did not receive any value from their event ticket
17 purchases.⁵⁷ Some (and perhaps many, most, or all) events provided valuable
18 products and/or services to attendees in addition to the content of the events
19 themselves, including products, meals, and entertainment.

20 (b) With regard to compensatory damages (also called
21 "reliance damages"), Plaintiffs' proposed method assumes that, absent the allegedly
22

23 ⁵⁶ As indicated above, I refer to the term "damages" in an economic sense.
24 I understand that, under applicable UCL law, Plaintiffs are entitled to restitution but
25 not "damages."

26 ⁵⁷ I am referring to the information provided by the Plaintiffs in their Amended
27 Complaint, Motion for Class Certification, and Reply in Support of Class
28 Certification. If the Plaintiffs provide further information about their proposed
damages method, I understand that I may be asked to evaluate that information.

1 wrongful conduct in this case, no putative class members would have chosen to
2 attend an event. It also assumes that the events, and the travel expenses incurred by
3 all putative class members and for all events, have no value. The Plaintiffs provide
4 no support for these strong assumptions. It is highly likely that these assumptions
5 are inaccurate for some (and perhaps many, most, or all) putative class members.

6 (c) Determining the value any putative class member received
7 for an event ticket they purchased would require individualized analysis. As
8 a matter of economics, it cannot merely be presumed that none of the events had any
9 value.

10 (d) Determining the costs incurred by putative class members
11 for travel to and from events and the value, if any, such putative class members
12 obtained from such travel outside of event attendance is also inherently
13 individualized.

14 37. I may update and/or revise this analysis should further
15 information be provided to me. I understand that, if the Plaintiffs provide any expert
16 analysis related to their proposed damages calculation, I may be asked to perform an
17 economic evaluation of that analysis.

18
19 DATED: January 11, 2021

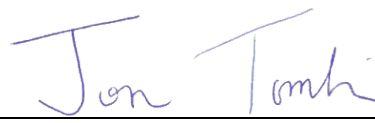
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21 
22 _____
Jonathan T. Tomlin, Ph.D.

EXHIBIT 1

JONATHAN T. TOMLIN, Ph.D.

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Jon Tomlin, Senior Managing Director, has performed economic and statistical analysis of complex damages issues for over twenty-five years. Jon has evaluated economic damages in cases involving alleged false advertising, mass torts, class certification, antitrust, breach of contract, fraud, and intellectual property. He has also published numerous articles on the application of economic principles to legal issues and has testified as an expert witness for cases in state and federal court.

EDUCATION

Ph.D., Economics, University of
California, Los Angeles, 1994

M.A., Economics, University of
California, Los Angeles, 1991

B.A., Economics, University of
Pennsylvania, College of Arts
and Sciences, Philadelphia, PA,
1989

Fields of Concentration

- Industrial Organization
- Antitrust Economics
- Intellectual Property
- Corporate Finance

HONORS AND AWARDS

UCLA President's Fellowship,
1989-1993

Experience includes:

- Ankura Consulting
2018-present
- Navigant Consulting
2010-2018
- LECG, LLC
Principal, 2003-2010
Senior Managing Economist, 1998-2002
- Capital Economics
Economist, 1998

AFFILIATIONS

American Economic Association

National Association of Business
Economists

Licensing Executives Society

American Finance Association

National Association of Certified
Valuation Analysts, Economics
Instructor

B.E. Journal of Economic
Analysis & Policy, Referee

Journal of Forensic Economics,
Referee

Provided economic analysis for projects involving law and economics.

- Economic Analysis Corporation
Senior Economist, 1996-1997
Provided economic and statistical analysis for projects involving questions in the areas of industrial organization, antitrust, intellectual property, and corporate finance.
- Micronomics, Inc.
Economist, 1994-1996
Provided economic and statistical analysis for litigation consulting and regulatory issues.
- University of California, Los Angeles, Department of Economics
Teaching Assistant, 1993-1994
Taught Intermediate Microeconomics to undergraduates.

Research Assistant, 1992-1993
Provided research support for economics faculty.
- Econalysis, Inc.
Research Assistant, 1992-1994
Provided research support for litigation.
- Brinton Economics
Research Assistant, Summer 1987
Collected and analyzed data in support of damages calculations for litigation.

Books

- "Hicks-Marshall Conditions and Defining Antitrust Markets for Intermediate Goods," with Georgi Giozov, James Langenfeld, and David Weiskopf, *Research in Law and Economics*, Chapter 3, Volume 27 (2015).
- "Manufacturing Input Markets," with James Langenfeld, William Nye, and Louis Silvia, *Market Definition in Antitrust: Theory and Case Studies*, American Bar Association, 2012, Chapter II.

Peer-Reviewed Research

- "The Impact of Smoking Bans on the Hospitality Industry: New Evidence from Stock Market Returns," *The B.E. Journal of Economic Analysis & Policy*: Vol. 9: Iss. 1 (Contributions), Article 13 (2009).
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- "Federalism and the Indirect Purchaser Mess," with Dale J. Giali, George Mason Law Review, Volume 11, Number 1, Fall 2002.

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- "Durational Disconnect Between Cartel Pleas and Class Certs.," Law360, August 9, 2019.
- "Product Labeling Class Actions – Identifying the 'Con' in Conjoint Surveys," with Robert Zeithammer, Bloomberg Law, November 1, 2018.
- "One Size Doesn't Fit All in Product Labeling Class Actions," Law360, June 15, 2018.
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- "Early Lessons from the DOJ Auto Parts Investigation," with Chris Ring, Law360, July 14, 2017.
- "Class Certification and Economic 'Argle Bargle'," Law360, December 16, 2015.
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- "Examining Expert Witness Testimony and Judicial Gatekeeping: Insights from Game Theory," with David Cooper, Mealey's Daubert Report, Volume 13, Issue #1, January 2009.
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- "Unprofessional Economic Testimony: Why It is a Problem and How Technical Advisors Can Help," with David Cooper, American Bar Association Section of Antitrust Law Economics Committee Newsletter, Volume 7, Number 2, Fall 2007.
- "Recognizing Damages Manipulation: Tips for Putting Barbed Wire on the Daubert Gate," The Committee on Commercial & Business Litigation Newsletter, American Bar Association, Vol. 8, No. 3, Spring 2007.
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- "Classwide Damage Models in Misleading and False Advertising Consumer Class Actions," Strafford Publications webinar, May 2020.
- "Antitrust Economics: Fundamental Concepts Practitioners Need to Know," California Lawyers Association webinar, January 28, 2020.
- "Viewpoints on UCL Trends and Developments," California Lawyers Association Annual Meeting, October 2019.
- "Classwide Damage Models in Misleading and False Advertising Consumer Class Actions," Strafford Publications webinar, May 2019
- "Damages Models in Food Labeling Class Actions," ABA Section of Litigation, Consumer Litigation Committee, February 2019.

- "The Georgia-Pacific Factors: Are They Useful?," Utah IP Summit, February 2016.
- "Econometrics or Just a Con?: Uses and Abuses of Data and Statistics in Competition Cases," Los Angeles County Bar Antitrust Section, May 2015.
- "Clayworth v. Pfizer, Inc. Rejected the Pass-on Defense, or Did It?," Los Angeles County Bar Antitrust Section, March 2011.
- "The Comcast/NBC Merger: Frightening Media Consolidation or Good for Consumers?," Los Angeles County Bar Association Antitrust Section, May 2010.
- "Setting the Bounds of Section 2 Liability: Understanding linkLine and its Potential Implications," Los Angeles County Bar Association Antitrust Section, November 2008.
- "Economics at the Intersection of Antitrust and Intellectual Property," Los Angeles County Bar Association Antitrust Section, September 2002.
- "How Federal and State Laws Can Fail to Work Together: The Economics of Indirect Purchaser Laws," George Mason Law Review Antitrust Symposium, May 2002.

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- Will Kaupelis and Frank Ortega, individually and behalf of all others similarly situated v. Harbor Freight Tools, USA, Inc. Central District of California. Expert Declaration, Deposition Testimony. 2020.
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- Megan Schmitt et al. v. Younique, LLC. United States District Court. Central District of California. Expert Report. 2018.
- Claudine Macaspac, on behalf of herself, all others similarly situated, and the general public v. Henkel Corporation. United States District Court, Southern District of California. Expert Report. 2018.
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- Cynthia E. Spann, Individually and on Behalf of Others Similarly Situated v. J.C. Penney Corporation, Inc., United States District Court, Central District of California. Expert Declaration, Deposition Testimony. 2013.
- Eastman Kodak Company v. Altek Corporation, United States District Court, Southern District of New York. Expert Declaration. 2013.
- Maria Torres, Gabriel Rojas, and Ian Kerner, individually and on behalf of all others similarly situated v. J.C. Penney Corporation, Inc., United States District Court, Northern District of California. Expert Declaration. 2013.
- Source Health Analytics, Inc. et al. v. SDI Health, LLC, et al., Court of Common Pleas, Philadelphia County. Expert Report. 2012.
- Promega Corporation et al. v. Life Technologies Corporation, Applied Biosystems, LLC, and Invitrogen IP Holdings, Inc., United States District Court, Western District of Wisconsin. Expert Report, Deposition Testimony. 2011.
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EXHIBIT 2

EXHIBIT 2

MATERIALS CONSIDERED

A. Case Filings

1. Amended Complaint filed November 12, 2019
2. Plaintiffs' Notice of Motion and Motion for Class Certification and Exhibits filed November 25, 2019
3. Plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification and Exhibits filed January 13, 2020
4. Herbalife's Evidentiary Objections in Support of Opposition to Plaintiffs' Motion for Class Certification filed December 20, 2019
5. Defendant Herbalife's Opposition to Plaintiffs' Motion for Class Certification and Attachments filed December 20, 2019
6. Herbalife's Request for Judicial Notice in Support of Opposition to Plaintiffs' Motion for Class Certification and Exhibits filed December 20, 2019

B. Interrogatory Responses

7. Herbalife's Responses to Plaintiff Jennifer Ribalta's First Set of Interrogatories dated July 17, 2019
8. Herbalife's Responses to Plaintiff Jennifer Ribalta's Second Set of Interrogatories and Exhibit dated September 13, 2019
9. Herbalife's Responses to Plaintiffs' Amended Third Set of Interrogatories to Defendant dated December 23, 2019
10. Plaintiff Izaar Valdez' Responses to Herbalife's Interrogatories, Set One dated August 20, 2019
11. Plaintiff Jeff Rodgers' Responses to Herbalife's Interrogatories, Set One dated August 20, 2019
12. Plaintiff Jennifer Ribalta's Responses to Herbalife's Interrogatories, Set One and Attachment dated August 20, 2019
13. Plaintiff Patricia Rodgers' Responses to Herbalife's Interrogatories, Set One dated August 20, 2019

C. Declarations and Expert Reports

14. Declaration of Jason Jones and Exhibits filed January 13, 2020
15. Declaration of Tommy Gioiosa in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification filed December 20, 2019
16. Declaration of Gopi K. Panchapakesan in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification and Exhibits filed December 20, 2019
17. Declaration of Jorge de la Concepcion in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification filed December 20, 2019
18. Declaration of Kimberly Cooper in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification and Exhibits filed December 20, 2019
19. Declaration of Sacha Mauricio Domingo Donovan in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification filed December 20, 2019
20. Declaration of Bob Bogard in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification and Exhibits, filed December 20, 2019
21. Declaration of Jennifer Ribalta filed January 13, 2020
22. Declaration of Etan Mark and Exhibits filed November 25, 2019
23. Expert Report of Robert L. Kehr in Support of Herbalife's Opposition to Plaintiffs' Motion for Class Certification and Exhibits filed December 20, 2019

D. Produced Materials

24. HLF_034754

E. Public Materials

25. Allen, Mark, Robert Hall, and Victoria Lazear, Reference Guide on Estimation of Economic Damages," *Reference Manual on Scientific Evidence*, Federal Judicial Center, 3rd Ed., 2011.
26. Allenby, Greg, Jeff Brazell, John Howell, and Peter Rossi, "Valuation of Patented Product Features," *Journal of Law and Economics*, vol. 57, August 2014

27. Anderson, Curt, “Herbalife Distributors Claim in \$1B Suit Events Were a Sham,” *Associated Press*, August 21, 2018
28. Herbalife 2019 Annual Report
29. Tomlin, Jon, “Reliability of ‘Price Premium’ Calculations in Class Actions,” *Law360*, October 10, 2017
30. *Wendy Chowning v. Kohl’s Department Stores, Inc., et al.*, United States Court of Appeals for the Ninth Circuit, Memorandum filed June 18, 2018
31. *Werdebaugh v. Blue Diamond Growers*, No. 12-2724, 2014 WL 2191901 at *22 (N.D. Cal. May 23, 2014)
32. www.Herbalife.com